

# MEMORANDUM

**TO:** Members, Clark Fork Basin Water Management Task Force (Task Force)  
**FROM:** Gerald Mueller  
**SUBJECT:** Summary of the March 9, 2006 Task Force Meeting  
**DATE:** March 12, 2006

## Participants

The following people participated in the Task Force meeting:

### *Task Force Members:*

Marc M. Spratt	Flathead Conservation District/Flathead Chamber of Commerce
Holly Franz	PPL Montana
Gail Patton	Sanders County
Elna Darrow	Flathead Basin Commission
Matt Clifford	Clark Fork Coalition
Fred Lurie	Blackfoot Challenge
Bill Slack	Flathead Joint Board of Control
Harvey Hackett	Bitterroot Water Forum

### *Staff:*

Gerald Mueller	Consensus Associates
Mike McLane	Montana Department of Natural Resources and Conservation (DNRC)

### *Other:*

Phil Tourangeau	Confederated Salish and Kootenai Tribes
Bruce Measure	Montana Member, Northwest Power and Conservation Council
Rhonda Whiting	Montana Member, Northwest Power and Conservation Council

## Meeting Agenda

- Task Force membership
- Northwest Power and Conservation Council Presentation
- Discussions with Hal Harper and Mary Sexton
- DNRC Ground Water-Surface Water Working Group
- Ground water conference discussion
- Review work plan
- Public comment
- Next meeting

## Task Force Membership

One change has occurred in the Task Force membership. Steve Fry will no longer represent Avista; instead, Nate Hall, who works out of Avista's Noxon Resource Office, will represent Avista. Mike McLane stated that DNRC Director Mary Sexton has not yet signed the letter officially designating the Task Force members.

## Northwest Power and Conservation Council Presentation

Bruce Measure and Rhonda Whiting, Montana's two members to the Northwest Power and Conservation Council (NWPPCC) discussed two topics: legislation recently passed by the Washington legislature and signed into law by Governor Gregoire, and the federal lawsuit challenging the salmon and steelhead biological opinion.

Washington Legislation - This legislation was signed into law on February 16, 2006. A copy of the legislation is included below as Appendix 1. Its purpose is to develop new water supplies in the Columbia basin for both consumptive and instream uses. The development is to occur through new storage, conservation, and "...any other actions designed to provide access to new water supplies within the Columbia river basin for both instream and out-of-stream uses." It is possible that this additional water development in Washington may come at the expense of Montana water uses provided by Hungry Horse and Libby Dams. Previous Montana NWPCC members have sought to reduce the operational impacts on Hungry Horse and Libby by limiting their draw down through September and reducing their fluctuations to generate peak power. In 2003, the NWPCC adopted "Mainstem Amendments" which included the following provisions regarding Hungry Horse and Libby:

Spring and summer operations at Libby and Hungry Horse dams

- Continue to implement the VARQ flood control operations and implement Integrated Rule Curve operations as recommended by Montana Fish, Wildlife & Parks.
- With regard to operations to benefit Kootenai River white sturgeon, the Council recommends a refinement to operations in the biological opinion that specify a "tiered" strategy for flow augmentation from Libby Dam to simulate a natural spring freshet.
- Refill should be a high priority for spring operations so that the reservoirs have the maximum amount of water available during the summer.
- Implement an experiment to evaluate the following interim summer operation:
- Summer drafting limits at Libby and Hungry Horse should be 10 feet from full pool by the end of September in all years except during droughts when the draft could be increased to 20 feet.

These amendments are designed to protect Montana's bull trout, cutthroat trout, and white sturgeon. Unfortunately, these amendments have not been implemented. Mr. Measure and Ms. Whiting will continue to monitor development of this legislation and encourage this group to explore the implications of this legislation to our interests and to report our conclusions back so that Montana's interests can present a united front in the opposition to any perceived detriment to the state or its' citizens.

Litigation - The state of Montana originally filed amicus brief in the litigation against the Endangered Species biological opinion addressing Columbia River salmon and steelhead stocks. Subsequently, Idaho, Montana and Washington joined the lawsuit as defendants, Oregon intervened as a Plaintiff. Judge Redden, who is hearing the case, has issued a one year stay in the proceedings to allow the parties to seek an agreement. Montana's NWPCC members report significant progress from the weekly meetings by the coalition of upriver interests and the Bonneville Customer Group, but a great deal of unproductive posturing and sidetracking by the Plaintiff's representatives. The Montana NWPCC members formed the coalition to advocate for upstream interests, including the mainstem amendments. The coalition includes: the states of Montana and Washington; the Kootenai of Idaho, Colville and Spokane Tribes; and the BPA customer group. The coalition has met and continues to meet to develop positions in the litigation. The coalition originally included only sovereigns, i.e., states and tribes, but recently has included others if they agree that the discussions at the meetings cannot be used against the participants in legal proceedings. Judge Redden appears receptive to some coalition positions.

### **Discussions with Hal Harper and Mary Sexton**

Gerald Mueller reported that after the last meeting, he met with Hal Harper, Governor Schweitzer's chief policy aid, to convey the Task Force's concerns about beginning activity that would lead to the negotiations called for in HJR3, passed by the last legislature. Mr. Harper stated that he had had one conversation with Mr. Steele about the Hungry Horse initiative, and

that Chairman Steele is approaching water right related issues cautiously. He agreed that it would be a good idea to contact Mr. Steele about the state's interest in talking with the Bureau about the process necessary for determining how much Hungry Horse water state water users need and how much of it may be available for a contract with the state. Mr. Harper said he would visit with Chairman Steele.

Mike McLane reported that DNRC Director Mary Sexton has said that a meeting between the state and the Tribes will be scheduled for late March or early April. The Hungry Horse initiative will be discussed at that meeting. Ms. Sexton, Hal Harper, and the Montana NWPCC members will participate on behalf of the state. Mr. McLane also indicated that the Clark Fork Roundtable discussed at the last Task Force meeting has not yet been scheduled. Depending on the outcome of this Roundtable, additional funding may be available to the Task Force.

### **DNRC Ground Water-Surface Water Working Group**

Mike McLane showed a Power Point presentation explaining the background concerning the Working Group, which Mary Sexton created and he is facilitating. He also shared the Working Group's recommendations for statutory changes that will be presented to the Legislative Environmental Policy Committee (EQC). The recommendations are included below in Appendix 2. The Task Force agreed to review the recommendations prior to its next meeting in April and to consider taking a position on them at that meeting.

### **Ground Water Conference Discussion**

Technical Conference - Mr. Mueller reported that he has attempted to contact University of Montana Geology Professors Woessner and Moore to see if plans are underway for including the Task Force conference as an extra day on the Riverene Center Conference this coming fall. He did have a conversation with Professor Moore who thought that the Riverene Center planned to incorporate an extra day for the Task Force ground water topics, but that Professor Woessner should be contacted to confirm this. Mr. Mueller stated that because Professor Woessner is traveling, this contact remains to be made. Mr. Mueller also said that he had answered questions that Tom Patton and John LaFave had posed regarding the Bureau of Mines and Geology's preparation of the pre-conference white paper discussed at the last Task Force meeting. Mr. Mueller asked Mr. Patton and LaFave to prepare a cost estimate for preparing the paper, but he has not had a response yet. He will call Mr. Patton prior to the next meeting.

Policy Conference - The Task Force discussed the target audience and issues that might be addressed in a separate policy conference that would follow the technical conference. The list of interests to target and of the issues follows:

#### **Target List**

- Elected local and tribal government officials
- Local government planners
- Legislators/candidates
- Task Force member constituencies
- Irrigation districts

#### **Issue List**

- Present and projected use of water
- The implications of converting agricultural lands to non-agriculture uses such as subdivisions on water management and use
- The recommendations of the DNRC Surface /Ground Water Working Group
- Water demands and uses in downstream states

- Re-use of waste water

Mr. Mueller agreed to produce and circulate to the Task Force prior to its next meeting a one page summary of the policy conference ideas.

### **Work Plan**

Two additional topics were suggested for Task Force deliberations: the water compact between the state and the United States Forest Service (USFS), and a possible inter- state organization to consider water allocations among the four Columbia basin states, i.e. Montana, Idaho, Oregon, and Washington.

### **Public Comment**

There was no additional comment.

### **Next Meeting**

The next meeting scheduled for Tuesday, April 4, 2006. The agenda topics will include: the Hungry Horse negotiations, the ground water technical and policy conferences, the USFS compact, the inter-state water allocation body, and the Surface/Ground Water Working Group recommendations. A representative of the Compact Commission and the USFS will be invited for the USFS Compact. Jack Stultz, DNRC Water Resources Division Administrator, will be invited to discuss existing four state water quantity deliberations.

## **Appendix 1**

See document attached in Adobe format.

## Appendix 2

### ***Surface Water / Ground Water Work Group***

#### **Recommend for Statutory Change**

### **Augmentation, Ground Water Analysis & Basin Closure Amendments**

March 3, 2006

**85-2-102 New Definition: "Augmentation Plan"** means an arrangement, either temporary or permanent, to make water available for a new beneficial use in a water source or tributary through the development of a new or alternative water supply that reasonably prevents depletions to surface water where required or adverse effect to any water rights, or both.

New Section: "Municipality" means any incorporated city or town in the state organized and incorporated under Title 7 chapter 2 Montana Code Annotated.

**New Section: "Stock water"** means the use of water to provide drinking water for livestock which includes, but is not limited to, cattle, sheep, swine, goats, horses, mules, asses, llamas, alpacas, bison, ostriches, rheas, emus, and domestic ungulates.

**85-2-102. (Temporary) Definitions.** Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436; or

(d) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436; or

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408.

(e) a use of water for augmentation.

**85-2-329. Definitions.** Unless the context requires otherwise, in 85-2-330 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly~~



~~connected to surface water.~~

(3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(4) "Teton River basin" means the drainage area of the Teton River and its tributaries above the confluence of the Teton and Marias Rivers.

**85-2-330. Basin closure -- exceptions.** (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a reservation to reserve water within the Teton River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal~~ municipalities or stock use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e) emergency temporary appropriations as provided for in 85-2-113 (3) .

(f) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, e and f.

**85-2-335. Definitions.** Unless the context requires otherwise, in 85-2-335 through 85-2-338, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302.

(2) "Upper Clark Fork River basin" means the drainage area of the Clark Fork River and its tributaries above Milltown dam.

**85-2-336. Basin closure -- exception.** (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water within the Upper Clark Fork River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application filed prior to January 1, 2000, for a permit to appropriate surface water to conduct response actions or remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not be used for dilution and must be limited to

a term not to exceed the necessary time to complete the response or remedial action, and the permit may not be transferred to any person for any purpose other than the designated response or remedial action.

(c) an application for a permit to appropriate surface water to conduct aquatic resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376). A permit issued to conduct mitigation actions may not be used for dilution.

(e d) an application for a permit to appropriate surface water for stock use;

(d e) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e f) an application for power generation at existing hydroelectric dams. The department may not approve a permit for power generation if approval results in additional consumption of water.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, d, and f.

(3) Applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water reservation application does not provide standing to object under 85-2-402.

(4) The department may not process or approve applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316.

**85-2-337. Ground water permit applications -- report required.** (1) During the period of basin closure provided in 85-2-330, 85-2-336(1), 85-2-340, 85-2-342, 85-2-344, or any administratively closed basin pursuant to 85-2-319, an applicant for a ground water permit in the Upper Clark Fork River a closed basin shall submit a report prepared by a professional engineer or hydrologist person educated and experienced in ground water science, addressing that analyzes the hydrologic hydraulic connection between the source of the ground water and surface water and that quantifies depletions to surface water that result from the proposed appropriation. If the applicant fails to submit the report required in this section, the application is considered defective and must be processed pursuant to 85-2-301.

~~(2) Except as provided in subsection (3), the department may not issue a permit to appropriate ground water in the Upper Clark Fork River basin unless the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the source of the ground water is not a part of or substantially or directly connected to surface water.~~

(3 2) The department may issue a permit to appropriate ground water if the application includes an augmentation plan and if the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the augmentation plan provides for sufficient augmentation water in amount, time, and location to replace reasonably prevent depletions to surface water senior water rights.

(3) Where an augmentation plan requires an "Application for Change of Appropriation Right" under 85-2-402, that change application will be submitted with the "Application for Beneficial Water Use Permit" and its attached hydrologic report and augmentation plan. These applications will be evaluated in a combined proceeding.

**85-2-339. Terminated.** Sec. 6, Ch. 281, L. 1999.

**85-2-340. Definitions.** Unless the context requires otherwise, in 85-2-341 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a~~



~~stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

(3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above the confluence of the Jefferson and Missouri Rivers.

(4) "Madison River basin" means the drainage area of the Madison River and its tributaries above the confluence of the Madison and Jefferson Rivers.

(5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

**85-2-341. Basin closure -- exceptions.** (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a state water reservation to reserve water within the Jefferson River basin or Madison River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal,~~ municipalities or stock use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e) temporary emergency appropriations as provided for in 85-2-113(3).

(f) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, e, and f.

**85-2-342. Definitions.** Unless the context requires otherwise, in 85-2-343 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

(3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(4) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony dam.

**85-2-343. Basin closure -- exceptions.** (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a

permit to appropriate water or for a reservation to reserve water within the upper Missouri River basin until the final decrees have been issued in accordance with part 2 of this chapter for all of the subbasins of the upper Missouri River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate surface water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal~~ municipalities or stock use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more;

(e) an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun River, if the proposed use of water will help control erosion in the Muddy Creek drainage; or

(f) temporary emergency appropriations as provided for in 85-2-113 (3).

(g) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, d, e, f, and g.

**85-2-344. Bitterroot River subbasin temporary closure -- definitions -- exceptions.** (1) Unless the context requires otherwise, in this section, the following definitions apply:

(a) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(b) "Bitterroot River basin" means the drainage area of the Bitterroot River and its tributaries above the confluence of the Bitterroot River and Clark Fork of the Columbia River and designated as "Basin 76H".

(c) "Bitterroot River subbasin" means one of the following hydrologically related portions of the Bitterroot River basin:

(i) the mainstem subbasin, designated as "Subbasin 76HA";

(ii) the north end subbasin, designated as "Subbasin 76HB";

(iii) the east side subbasin, designated as "Subbasin 76HC";

(iv) the southeast subbasin, designated as "Subbasin 76HD";

(v) the south end subbasin, designated as "Subbasin 76HE";

(vi) the southwest subbasin, designated as "Subbasin 76HF";

(vii) the west central subbasin, designated as "Subbasin 76HG"; or

(viii) the northwest subbasin, designated as "Subbasin 76HH".

(2) As provided in 85-2-319, the department may not process or grant an application for a permit to appropriate water or for a state water reservation within a Bitterroot River subbasin until the closure for the basin is terminated pursuant to subsection (3) of this section, except for:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate surface water for a ~~municipal~~ municipality's

water supply;

(c) temporary emergency appropriations pursuant to 85-2-113 (3); or

(d) an application to store water during high spring flow in an impoundment with a capacity of 50 acre-feet or more.

(e) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) Each Bitterroot River subbasin is closed to new appropriations and new state water reservations until 2 years after all water rights in the subbasin arising under the laws of the state are subject to an enforceable and administrable decree as provided in 85-2-406 (4).

(5) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, and e.